

State Environmental Commission (SEC)

General Overview – Contested Cases (Appeal Hearings)

1.) General Description

A proceeding in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing, or in which an administrative penalty may be imposed (NRS 223B.032). Requirements for contested case are set by the Nevada Administrative Procedures Act (APA) in Chapter 233B of the NRS see: <http://www.leg.state.nv.us/nrs/nrs-233b.html>

2.) Do Process

Due Process requires that notice be reasonably calculated, under all the circumstances, to inform the interested parties that action is pending. The notice must notify parties of factual and legal issues that will be raised at a hearing (i.e., SEC Appeal).

3.) Content of Appeal Notice

- A statement of the time, place and nature of the hearing
- A statement of the legal authority and jurisdiction under which the hearing is to be held
- A reference to the particular sections of the statutes and regulations involved, and
- A short and plain statement of the matters asserted (NRS 233B.121(2))

4.) Opportunity for Hearing, Impartial Hearing Officer, and Ex Parte Communications

- An opportunity for a hearing allows evidence to be presented and the ability to cross-examine witnesses
- A right to counsel is guaranteed with an impartial hearing officer
- No Agency member who acts as an investigator or prosecutor may take part in the adjudication of a case (NRS 233b.122(1))
- Ex Parte Communications “Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity to all parties to participate (NRS 233B.126)

5.) Pre-Hearing Issues

- Pre-hearing conference may be requested
- Discover (request for production of documents, interrogatories and depositions (may or may not be required)
- Subpoenas (are allowed by the SEC Rules of Practice)

6.) At the Hearing

- Introduce the case, note the date, time and place of hearing, state the issues, set out the order of presentation and have parties note appearance for the record.
- Swear in witnesses – every witness is required to declare by oath or affirmation that he/she will testify truthfully (NRS 223B.123(3)). Hearing officer or SEC counsel is authorized to administer oath

- Sec Rules of Practice outlines general procedures for Appeal Hearings
- Introduction of Evidence – testimony by witness, determine credibility of witness, acceptance of document (Evidence to be excluded would be irrelevant, immaterial or unduly repetitious)

7.) Post Hearing Issues

- A reasoned decision must include findings of fact such as concise and explicit statement of the underlying facts supporting the findings; facts supporting decision must be in the record and must be supported by substantial evidence.
- Conclusions of law (must be stated separately from findings of fact)
- Reasoned decision must be in writing or stated in the record, served by person or certified mail

8.) Developing the Record - The record in a contested case must include:

- All pleadings, motions and intermediated rulings
- Evidence received or considered
- A statement of matters officially noticed
- Questions and offers of proof and objections, and rulings thereon
- Proposed findings and exceptions
- An decision, opinion or report by the hearing officer presiding at the hearing
- Exhibits are to be marked and an exhibit list should be developed
- During hearing the SEC appeal panel should rule on introduction of each exhibit

9.) Judicial Review

Judicial Review is confined to the record of the hearing and considers whether the decision:

- Violates constitutional or statutory provision
- Exceeds agency's statutory authority
- Made upon unlawful procedure
- Affected by legal error
- Is clearly erroneous in view of reliable, probative and substantial evidence in the records
- Is arbitrary, capricious, or characterized by abuse of discretion (i.e., was the decision based on evidence of reasonable person could make same conclusion (NRS 233B.135